KEYWORD: Personal Conduct

DIGEST: Applicant is a program director for a defense contractor. He was a government employee working in a military laboratory, research, and engineering organization for over 37 years. Applicant was the second ranking civilian in the organization when he was removed from the senior executive service and federal service for violating the rules for using religious compensatory time, and restored annual leave. Applicant has met his heavy burden, and mitigated the security concerns for his personal conduct. Clearance is granted.

CASENO: 03-14079.h1

DATE: 09/12/2005

DATE: September 12, 2005

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-14079

DECISION OF ADMINISTRATIVE JUDGE

THOMAS M. CREAN

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Department Counsel

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Daniel C. Schwartz, Esq.

Anna C. Ursano, Esq.

SYNOPSIS

Applicant is a program director for a defense contractor. He was a government employee working in a military laboratory, research, and engineering organization for over 37 years. Applicant was the second ranking civilian in the organization when he was removed from the senior executive service and federal service for violating the rules for using religious compensatory time, and restored annual leave. Applicant has met his heavy burden, and mitigated the security concerns for his personal conduct. Clearance is granted.

STATEMENT OF THE CASE

On March 3, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny a security clearance for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive). Applicant acknowledged receipt of the SOR on March 9, 2004. The SOR alleges security concerns under Guideline E (Personal Conduct) of the Directive.

Applicant answered the SOR in a detailed written response on April 8, 2004. He admitted in part and denied in part with explanation the allegation under Guideline E. He requested a hearing before an administrative judge, and the request was received by DOHA on April 12, 2004. Department Counsel was prepared to proceed with the case on April 29, 2005, and the case was assigned to me on May 12, 2005. A notice of hearing was issued on June 24, 2005. Hearings on motions were held on June 29, 2005, and July 11, 2005.[(1)] The hearing convened on July 12, 2005. Six government exhibits, 59 Applicant exhibits, the testimony of four Applicant witnesses, and the testimony of the Applicant were received during the hearing. Administrative notice was taken of nine regulations and code sections and marked as Court Documents 1 to 9. The final transcript was received on August 5, 2005.

RULINGS ON MOTIONS

The use of Religious Compensatory Time (RCT) and the calculation of civilian annual and sick leave in Applicant's organization was investigated by an Inspector General.[(2)] Applicant filed a motion *in limine* on June 14, 2005, to limit the introduction by Department Counsel of the Inspector General's Report.[(3)] Department Counsel responded to the motion on June 23, 2005.[(4)] Applicant filed a rebuttal to Department Counsel's response on June 27, 2005.[(5)] Hearings on the motion were held on June 29, 2005 (Motion Tr. 1), and July 11, 2005 (Motion Tr. 2).

Applicant objected to the admission of The Report because it was not relevant to the allegation in the SOR, and because it was based on irrelevant witness hearsay evidence, depriving Applicant of his right to confront and cross examine witnesses.[(6)] The government argued that allegations 1 and 2 in The Report are interrelated, and relevant and admissible hearsay under Directive E3.1.20, and Federal Rules of Evidence 803(8) and 807. In addition, the government contends the enclosures to The Report are admissible under Federal Rule of Evidence 106 for completeness. The Applicant argued that their Motion *In Limine* understood hearsay evidence can be admitted in security determination cases. However, Applicant contends the government's answer ignores Applicant's absolute right under the Directive to confront and cross-examine witnesses.[(7)] Department Counsel argued that Applicant receives his right to confront and cross-examine witnesses in the hearing.[(8)]

I ruled that The Report is admissible under the provisions of Directive E3.1.20 as an official record furnished by an investigative agency pursuant to its responsibilities, and Federal Rule of Evidence 803 (8) (c), provided that each provision in The Report the government wished to enter in evidence was relevant to a determination of Applicant's security worthiness and the allegation in the SOR. The parties agreed that IG Allegation 3 was not relevant to a determination of Applicant's security worthiness and would not be admitted.[(9)] The parties also agreed IG Allegation 2 was relevant to the allegation in the SOR and Applicant's security worthiness, and would be admitted. I further ruled that some paragraphs of IG Allegation 1 were admissible to give full meaning and context to the allegation in the SOR. The parties were directed to examine the paragraphs of The Report pertaining to IG Allegation 1 to determine the relevancy of each paragraph to allegation 1.a. in the SOR. I also ruled Applicant could call as witnesses the authors of The Report, if he so chose, to clarify The Report's findings. I also ruled Applicant could call any person who provided a statement for The Report to rebut the summary of findings in The Report based on their testimony.

The parties agreed on the paragraphs of The Report under IG allegation 1 that were relevant and admissible, except for paragraph 16 of The Report.[(10)] I determined that paragraph 16 was a conclusion statement of the authors of The Report, not a statement of fact, and would not be admitted. The Report, with inadmissible parts redacted, are marked as Government Exhibits 1 and 2.[(11)]

FINDINGS OF FACT

Applicant is 61 years old and has worked for three years as a program manager and director for a defense contractor. He previously worked for over 37 years for a major military laboratory, research, and engineering organization. He completed his tenure at the organization as the second ranking civilian senior executive. Applicant held a security clearance, including access to sensitive compartmented information, for most of his civilian career. He only had two security violations, which were early in his career, and involved a failure to secure a safe lock, and to secure a confidential document.(12) He is a college graduate, married, with two children. He became a naturalized United States citizen in 1956.(13)

Applicant's organization conducted scientific research, development, and engineering for a military service, and had over 2,600 civilian employees. On June 21, 2002, a senior military flag officer removed Applicant from Federal Service and the Senior Executive Service (SES). The removal was based on the flag officer's lose of confidence in Applicant's ability to lead and manage the organization because of his misuse of religious compensatory times (RCT), and the resulting accumulation and restoration of annual leave.(14) Applicant appealed this decision to the proper United States government agency. The dispute was settled between the military service and Applicant,(15) and Applicant retired from government service after receiving a 120 day suspension without pay.(16)

The removal of Applicant from federal service was based on the investigation conducted by investigators from a military service Inspector General office.(17) The report of the investigators substantiated allegations of improper restoration of forfeited annual leave, and misuse of RCT by Applicant and others in the organization. The organization has two elements of equal size, one on the east coast and one on the west coast. Applicant was the senior civilian employee in the east coast element. The headquarters element of the organization was co-located with the east coast element. Each element had its own personnel office, and the east coast element provided personnel support to the headquarters element.(18)

The government leave system for Senior Executive Service members (SES) must be understood to examine Applicant's conduct, and determine if the misconduct affected Applicant's security worthiness. Government employees, including SES, earn annual and sick leave each pay period during the year.(19) Prior to October 13, 1994, members of the SES could accumulate an unlimited amount of annual leave. After that date, SES were limited to accumulating only 720 hours of annual leave. For SES who had accumulated in excess of 720 hours of annual leave on October 13, 1994, their accumulated leave as of that day was "grandfathered," and there was a personal leave ceiling for accumulation of annual

leave created. The personal leave ceiling could be reduced but it could never be increased. Annual leave earned but not taken in excess of the personal leave ceiling would be forfeited, if it was not restored. At the time of retirement or separation from government service, SES receive a payment for the full amount of accumulated annual leave, up to the 720 hours or personal leave ceiling, whichever is applicable, at the rate of pay in effect at the time of retirement or separation.[(20)] There is no ceiling on the accumulation of sick leave. At separation or retirement from government service, SES are not paid for sick leave but the accumulated sick leave time is added to the time in service for annuity purposes.[(21)]

Before 1978, federal civilian employees who felt compelled to be absent from work to satisfy their religious obligations were required to take annual leave or leave-without-pay. There were no provisions for employees to earn and use compensatory time for any reason. In 1978, Congress provided a procedure for compensatory time for religious observances, called Religious Compensatory Time.[(22)] The Office of Personnel Management published implementing guidance.[(23)] The military services also issued implementing instructions.[(24)] Local military organizations issued their own instructions.[(25)] These instructions permitted civilian employees to work additional hours for the purpose of taking time off, without charge to leave, when personal religious beliefs require that the employee abstain from work for religious reasons during certain periods of the workday or work week. Any employee who elects to work additional hours for this purpose may be granted an equal amount of time off from his or her scheduled tour of duty. The Office of Personnel Management (OPM) guidance is:

"Agencies should require employees to submit a written request for an adjusted work schedule in advance. An employee should specifically state that his or her request for an adjusted work schedule is for religious purposes and should provide acceptable documentation of the need to abstain from work. When deciding whether an employee's request for adjusted work schedule should be approved, a supervisor should not make any judgment about the employee's religious beliefs or his or her affiliation with a religious organization."[(26)]

The military service's guidance for Applicant's organization is very similar. It states the approval for compensatory time is with the organizationer or designee. The request must be in writing in advance of the performance of work, unless exigencies prevent prior approval. The maximum credit that can be earned and held for RCT use is 40 hours. The earned RCT must be taken within 90 days of earning the compensatory time.[(27)] Applicant's local organization issued guidance that was slightly different and allowed the accumulation of 80 hours of RCT.[(28)] There were many issues and concerns with the implementation of the provisions for RCT, which resulted in investigations by various Inspector Generals.[(29)]

When earned annual leave cannot be taken in the calendar year, there are provisions for the leave to be restored rather than forfeited. Leave earned during a calendar year must be taken within the year or accumulated up to the ceiling amount. If because of business exigencies, scheduled leave cannot be taken within the prescribed time, it can be restored. To be restored, the leave must have been requested at least three pay periods before the end of the leave year, and not taken because of exigencies of public business, or due to sickness. The restored leave must be approved by the head of the agency or designee. The restored leave is placed in a separate account and must be used within 2 years.[(30)] There were also provisions for the automatic restoration of leave based on Base Realignment and Closure (BRAC), and the year 2000 computer conversion (Y2K). This automatic restored leave had to be used within 2 years of the end of the

BRAC realignment or forfeited. (31)

Normally, government civilian employees are scheduled for a normal work week of 40 hours. Applicant, and others in his organization because of business exigencies, worked a variable work schedule, know as the "Floating Forty." (32) This system allowed the employee to work anytime of day or night, with no requirement for daily core hours or a minimum number of hours in any given day. The first 40 hours of duty performed within a period of not more than 6 days is the basic work week. The time worked each day would be noted on a time card and approved by the supervisor. Applicant completed his own time card when he was not on travel noting the hours he worked each day. His secretary had the time card approved by anyone in the organization, including subordinates of Applicant, with signature authority. (33)

Applicant started working for the organization in 1966, and was appointed an SES in March 1987. He assumed the position of second ranking civilian in 1993. (34) On October 13, 1994, Applicant had an annual leave balance of 1,635 hours which became his personal leave ceiling. (35) At the time, Applicant was earning 208 hours of annual leave each calendar year. There is no information in The Report to indicate his personal leave ceiling was not properly accumulated. (36) I conclude this leave was properly earned and accumulated, and is Applicant's proper personal leave ceiling.

There is ample evidence in The Report to indicated Applicant rarely took leave and could be classified a "workaholic." (37) He usually started work each day at 6 or 7 a.m. and worked until about 6 p.m., and did not take lunch. He brought work home with him, and worked some on week-ends. On average, he worked about 60 to 70 hours a week. He also traveled on government business over 100 days a year. (38) From 1995 to 2001, The Report notes Applicant's leave record indicates he took 764.4 hours of leave classified as RCT. He also took 88 hours of leave classified as annual leave. During this time, he earned 1,140 hours of annual leave (208 hours per year for 6 years). (39) This indicates Applicant did not take all of his earned leave, no matter what category the leave was classified.

The majority of leave taken on Applicant's records was classified as RCT. (40) The most accurate listing of the categories of Applicant's leave is contained in a letter from Applicant's attorney to the senior military flag officer taking action against Applicant. It shows Applicant's time card had 396.9 hours classified as RCT, over seventy percent of the these hours noted as RCT by Applicant's secretary when Applicant did not sign his time card. Applicant only personally requested 76.5 hours of RCT. No matter what category Applicant's used leave was classified, Applicant never took all of the leave earned and forfeited leave each year. All of Applicant's leave was changed from RCT to annual leave after The Report was issued. (41)

RCT was in use in the organization before Applicant became a SES. Testimony from the Human Resources Director (HRD) of Applicant's organization shows RCT was implemented in the organization shortly after the law was passed and implementing instructions issued. The use of RCT was considered to be almost self-administered by the employee. In implementing and administering RCT, the HRD did not consult with the organization staff, or seek approval or

guidance from his human resource superiors, or legal staff.[(42)] The HRD was in his position when Applicant became a SES. He remained in that position after Applicant assumed leadership and management positions in the organization.[(43)]

Applicant's knowledge of the requirements for RCT came from the HRD. Applicant did not research the applicable regulations and requirements.[(44)] Applicant did not check with others in the organization to see if their interpretation of RCT was consistent with his. However, after the issue was raised, he learned there was a general misunderstanding among the employees of the organization, including the other SES members, of the meaning of RCT.[(45)] He did not believe there was a requirement for advanced approval of leave from superiors because of a waiver granted for that requirement.[(46)] The military commanders were not aware of either the existence or use of RCT in the organization. RCT was strictly a civilian employees issue.[(47)]

Over 600 employees, including most of the SES, in Applicant's organization took advantage of RCT. This number of users far exceed the number of participants at other organizations.[(48)] The former supervisor of payroll clerks for the organization stated RCT was in use when she started with the organization in 1985. The interpretation of RCT was liberal and RCT could be used for almost any reason. Employees did use it to take vacations. The employees also abused RCT by using advanced RCT without payback. She wrote letters to employees requesting repayment of advanced RCT, but until the payroll and leave functions were moved to a different organization, there was no accounting and repayment for advanced RCT.[(49)] After the investigation into the use of RCT at the organization, the organization's workforce was briefed by personnel experts and lawyers on the proper use of RCT, and provided additional detailed guidance.[(50)]

Applicant was raised in a religious faith but now does not have any prevalent religious affiliation. His religious belief is grounded in his relationship with people.[(51)] Applicant classified many leave activities as religious in nature, and eligible to be considered RCT, based on his belief. He classified such activities as visiting a half-brother in Germany, running a marathon with his daughter, and taking care of ill parents as religious in nature.[(52)] A reading of the requirements for RCT, does not justify the classification of Applicant's activities as religious in nature. Because of the way RCT was implemented in the organization and because of the lack of organization oversight of the program, these type activities were able to be wrongly classified as religious in nature.

Applicant did discuss the use of RCT with the HRD in approximately 1999, and was told by the HRD that if he thought it was appropriate, he could use RCT. The HRD did not think Applicant asked the question in the context of facilitating the accumulation and protection of annual leave.[(53)]

Applicant admitted in his answer to the SOR that he did not follow the proper procedures for use of RCT. He attributed his actions in not following proper procedure to a misunderstanding in the organization on RCT, and not on his intent to defraud the government. He did not request that hours worked over his 40 hour work week be considered for RCT in

advance of the work. When RCT was used, Applicant did not request the RCT in writing, was not reasonably specific as to the religious requirement, and it was not approved by a superior but by one of Applicant's subordinates with signature authority for leave.[(54)] Applicant's leave was classified and reported to the payroll office as RCT by his secretary, when it should have been classified and reported as annual leave.[(55)]

Since most of the leave Applicant took from 1995 to 2001 was classified as RCT, Applicant was not charged with the use of annual leave, and he could request that almost all of his earned annual leave be restored and not forfeited. From 1995 to 2001, The Report notes that Applicant earned 1,248 hours of annual leave, took only 40 hours of annual leave, had 485 hours classified as RCT, and 1,208 hours of leave restored, including some leave classified as RCT.[(56)] Most of this leave, 992 hours, was restored under the BRAC and Y2K automatic provisions to be used by January 2005. Applicant was credited with 216 hours of leave restored as not used in 2000. There were also 77 hours considered as RCT accumulated leave.[(57)] Even with all of the difference in the numbers and category of leave taken, I conclude that Applicant took less leave totally in all categories than he earned. Leave was improperly charged to RCT because of errors in interpretation and application of the standards and requirements for RCT. There was leave improperly restored as not taken because the leave taken had been improperly classified as RCT.

In 1997, Applicant forfeited 168 hours of unused annual leave. He requested restoration of the leave on January 5, 1998 which was approved by the commanding officer.[(58)] In November 1998, Applicant requested 232 hours of annual leave to be taken in the remaining part of the calendar year. The leave was approved but Applicant did not take the leave. In January 1999, Applicant requested and received 208 hours of restored leave. In 1998, Appliant took 123.8 hours of RCT.[(59)] In August 1999, Applicant submitted requests for 248 hours of annual leave to be taken in the remainder of the calendar year. Applicant did not take this leave and 200 hours of leave was restored based on his request of January 25, 2000. Applicant did not take any RCT leave in 1999.[(60)] In October 2000, Applicant requested 216 hours of annual leave to be taken in the remaining part of the calendar year. Applicant did not take the leave but did take 28 hours of RCT. Based on Applicant's request of January 30, 2001, 216 hours of unused annual leave were restored. He took 112.8 hours of RCT from November 2000 to June 2001.[(61)]

The majority of Applicant's leave was restored under BRAC. The Human Resources office of Applicant's organization determined in 1995 that approximately 140 personnel at the organization were entitled to automatic restoration of leave because of BRAC. Applicant was initially not on this list but was added later by the HRD.[(62)] Various members of the human resource team met to interpret the guidance from the Department of Defense, and concluded all previously restored leave should be classified as BRAC restored leave The expiration date for use of the BRAC resorted leave was extended by the payroll department of the organization in July 2001.[(63)] Applicant's restored leave for 1997, 1998, and 1999 was then converted to BRAC restored leave.

The Year 2000 computer conversion (Y2K) efforts created another category of automatically restored leave. Applicant was one of 95 employees of his organization identified as a Y2K official permitting automatic restoration of leave not used in 1999.[(64)] This restored leave was to expire in January 2002, if not used. In December 2000, the HRD advised his staff that all restored leave would be classified as BRAC restored leave, and a termination date for use of restored leave was determined as January 2005.[(65)] Applicant had restored leave of 992 hours due to expire in January 2005.[(66)]

Applicant considered his position in the organization as responsible for the technical direction of the organization. He considered the military commander as responsible for policy and direction of the organization.(67) He did not feel he had the time or expertise to inquire into personnel policies. He took the experts, the HRD and his subordinates, at their word on RCT. He did see some of the policy instructions on RCT, but does not specifically remember them. When he did see more information on RCT after the fact, he felt the instructions supported his understanding of RCT.(68) The HRD only indirectly worked for Applicant since there was another division head between them. As the senior civilian leader in the organization, Applicant did not check to insure proper procedures were followed, and that the process and use of RCT in the organization was appropriate. He did not question the HRD's guidance, and did not ask for any clarification from higher headquarters, his own legal staff, or discuss it with different military commanders.(69) The use of RCT by either himself or others in the organization did not raise any issues of concern to him or prompt him to seek more guidance.(70)

The misuse of RCT can be more than a simple error in categorizing or accounting if Applicant stands to gain from the misuse. As noted, upon Applicant's retirement in August 2001, he was entitled to receive dollar value for unused annual leave. He had 1,645 hours of leave properly accrued in the personal leave ceiling, and another 98 hours were accrued and not taken in the year of retirement for a total of 1,747 hours. The Report states that Applicant also could receive compensation for 1,208 hours of restored leave. It is not clear from the record how much of this leave was properly restored, but at least 992 hours were properly restored under BRAC and Y2K and not forfeited because the time limit for forfeiture had not run.. The remaining 216 hours is attributed to restored leave for 2000, of which some may not have been properly classified as restorable leave.(71) Applicant had not planned to retire for some time. When Applicant was required to retire in June 2002, he was reimbursed for unused leave. There is no indication in the record of how much Applicant was reimbursed in any category. Applicant does not know how the reimbursement was determined since the payroll accounting office did not break out for him the categories of the reimbursement. Applicant did not think he was reimbursed for any leave considered restored or accumulated as the result of RCT.(72) There was no evidence to suggest the motive for Applicant to restore leave.

There was testimony that the disciplinary action that the senior flag officer military commander took against Applicant, relieving him from his position and terminating his federal service and SES position, was vindictive and not in proportion to the action taken against other SES members in the organization who used RCT. There was a range of actions taken against the individuals, especially the SES members of the organization, by the commander.(73)

Applicant presented documents, awards, and achievements as testimony to his excellent duty performance. These included awards from organizations, government agencies, civilian organizations, and professional organizations. It included the Presidential Rank of Meritorious Executive, one of the highest awards given to a government employee. His performance ratings during 36 years of government service were always outstanding.(74) Applicant presented letters and testimony from former senior military officers and fellow government employees attesting to his good character, duty performance, and reputation in his scientific field.(75)

A retired flag officer, who is now a consultant to a military service, testified he has known and worked with Applicant since the early 1980s. Applicant worked with him on a number of important projects for the military service, while he was on active military duty as well as after his retirement. He considers Applicant to be one of the top five analysts in his field in the world. The number of people with his expertise are very limited, and to use his expertise a security clearance is required. He has the highest regard for Applicant's trustworthiness and commitment to safeguarding classified information. Applicant is needed to work in his field because of the needs of national security.[(76)]

A retired military officer who served as a senior intelligence officer testified he is a civilian consultant on loan to a military organization who worked closely with Applicant and his organization for the last seven years. Applicant was one of the most knowledgeable people and best analyst in his field. He has a high regard for Applicant's abilities and integrity. As a former intelligence officer, he does not consider Applicant a security risk, and Applicant has a high regard and commitment to security matters. He considers giving Applicant a security clearance as a very high benefit to the government.[(77)]

The president of the company presently employing Applicant testified Applicant is considered the most technically and professionally competent systems engineers in his field. Applicant enjoys a premier reputation for honesty and integrity.[(78)]

A retired government employee testified he has know Applicant since the mid 1960s and worked with him for over 33 years. He is not only a fellow worker, but Applicant's personal friend. Applicant is considered one of the best and brightest analyst in his field in the world. He is not a rules violator and is know as a strict rule follower. He has worked with Applicant on classified projects and handled classified material with him. Applicant is known to be very security conscious and follows security rules strictly. Applicant is always sought out by others in the field for his analysis and thoughts.[(79)]

Applicant's daughter testified that he is a rule follower and not a rule breaker. He is dedicated to the security of the United States. The family was not raised in a strict religion environment but does have religious beliefs. Her father always worked hard. They took some, but not many, vacations. He worked all the time, and would even work at home after dinner.[(80)]

I find from the testimony and exhibits presented by Appellant that he is a hard worker and considered one of the leading experts in his field. His expertise is needed and required. He has always followed security requirements and is regarded as very security conscious. During his career, he has had continual access to classified material to include special compartmented information.

POLICIES

The President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information."[(81)] Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.[(82)]

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions and mitigating conditions for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6.

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person.[(83)] An administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation of recurrence.[(84)]

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant.[(85)] It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the Applicant from being eligible for access to classified information.[(86)] Thereafter, Applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts.[(87)] An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."[(88)] "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability."[(89)] "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." [(90)]

Based upon a consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline E - Personal Conduct: A security concern exists for conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Any of these characteristics in a person could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions section below.

CONCLUSIONS

The government has established its case under Guideline E. The Report's detailed information on Applicant's conduct as a leader and manager of his organization, as well as his use of RCT, and restoration of leave brings the matter under Personal Conduct Disqualifying Conditions E2.A5.1.2.2 (*reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*) and E2.A5.1.2.5 (*a pattern of dishonesty or rule violation. . .*). The information in The Report established that Applicant's misuse of RCT, and improper restoration of annual leave reveals a pattern of rule violations. His failure as a leader and manager of the organization is reliable unfavorable information concerning the Applicant. The above disqualifying conditions have been established.

I find there was a pattern of rule violations concerning Applicant's use of RCT. RCT is a legitimate personnel policy when implemented correctly. Civilian employees can work extra hours as a substitute for normal work hours taken for religious purposes. Applicant worked extra hours and accumulated leave time for religious purposes. However, Applicant classified some of his leave as religious in nature when it was not. A reading of the guidance shows that RCT could not be taken to run marathons, visit family in Germany, and take care of sick family members, because they are not religious in nature. Applicant followed the personnel policy on RCT provided by the HRD. Any reasonable civilian employee would know that using RCT and not annual leave for these activities was questionable. Applicant, as a long term government civilian employee, knew or should have know he was taking time from the office to pursue activities that normally are counted against annual leave. He had an obligation to not just rely on the HRD but to check further. He was grossly derelict in taking advantage of a loophole in the system for his advantage. Applicant may have believed his classification of leave was correct and the proper procedures were being followed, but he was in error. He was clearly negligent in not checking to be sure the policy was correct and appropriate.

Applicant did not follow the established rules for approval of religious leave by a superior before accumulating the leave. He had the leave approved by a subordinate rather than a superior. It was his responsibility, not his secretary's, to ensure his leave was properly categorized and calculated. I do not find that there was a pattern of dishonesty in the use of RCT. Dishonesty requires a willful action knowing it is wrong. Applicant did not act dishonesty but did take advantage of a practice that he should have known was wrong without verifying its correctness. He was willfully negligent in not checking the correctness of the practice of RCT. This is especially true since the HRD worked for Applicant.

The classification of leave as RCT becomes an issue because it permitted Applicant to restore earned annual leave not taken. I find there is a pattern of rule violations in Applicant's accumulation of restored leave. Restoration of leave permitted Applicant to accumulate leave for his benefit. Applicant did not use all of the leave learned each year. Since the leave was classified as RCT, it permitted the restoration of all annual leave. The personnel rules permitted Applicant to legitimately restore annual leave earned but not taken. However, it is improper to take leave, have that leave classified as RCT, and then restore the RCT classified leave.

Applicant followed the rules for restoration of leave and submitted the proper paperwork. He did properly request leave to be taken at the end of a calendar year, but did not take the leave. Applicant submitted the proper requests each year for restoration of leave not taken, with some of the requests initialed by the military commander. He did take some RCT during the year but not to the extent of the leave earned. Even though the proper procedures were followed to restore leave, Applicant was restoring leave that should not have been available because the leave was incorrectly classified as RCT leave. Whether the restoring of leave other than RCT leave was proper must be determined by the experts. I have full confidence in the finance personnel that Applicant was only paid for the leave properly accumulated. In the end, Applicant worked more hours than the American taxpayer paid.

There is no information, evidence, or testimony that Applicant was wrongfully added to the list of personnel eligible for BRAC restored leave. The large number of personnel on the BRAC and Y2K lists for automatic restoration of leave indicates a personnel decision and not a conspiracy. There is no information, evidence, or testimony that the extension of time for use of BRAC restored leave was inappropriate. There is no information, evidence, or testimony that Applicant participated in any of the decisions to determine those eligible for BRAC and Y2K restored leave, and the extension of time for use of the leave. The personnel experts must determine if the decisions by the organization were correct. Even if the decisions made by the organizations HRD wrongly calculated the personnel eligible for BRAC and Y2K restored leave and wrongly extended the time for use of the leave, it does not reflect unfavorably on Applicant except in his management and leadership role. Those decisions were made by the personnel specialists of the organization, and not by Applicant.

The Report focused on Applicant cashing in restored leave on retirement. However, Applicant could have leave restored for a variety of reasons. The information, evidence, and testimony does show Applicant accumulated leave that he could have been reimbursed for upon retirement. The evidence, testimony, and information does show Applicant worked many more hours per week than the required 40 hours. He took leave, but never to the extent of the leave amount earned. When all of his earned leave is calculated and all used leave subtracted, Applicant took less leave than earned. While there is no evidence of the motive for restoring and stockpiling leave, the restored and accumulated leave is a general benefit to Applicant. He has leave to use for unforeseen circumstances, like illness or an extended trip. The leave can also be reimbursed upon retirement. However, Applicant would have to retire before the restored leave

expired, and the finance office approved the restored leave and pay the funds. Payment for the restored leave on retirement was not guaranteed. No matter the reason Applicant stockpiled restored leave, the restoration of leave was a general benefit to Applicant. It did not matter why he restored leave, it was a violation of the rules.

Applicant asked the HRD about RCT in approximately 1999, indicating that Applicant did not classify leave taken before that date as RCT. Applicant properly accumulated his personal leave ceiling. Applicant was paid for unused accumulated leave on retirement. I have full confidence in the finance personnel that Applicant was only paid for the leave properly accumulated. In the end, the American taxpayer got more from Applicant than they paid.

I find there is reliable unfavorable information concerning Applicant. The nature of the unfavorable information is a failure of leadership, management, and responsibility. There is no information, evidence or testimony presented, not withstanding the conclusions of the investigators and authors of The Report, to conclude there was a systematic conspiratorial process to defraud the government. There is no evidence, information, or testimony to suggest Applicant and any other user of RCT at the organization got together, under a rock, in the dark of night, to hatch a plot to use RCT to defraud the government. The large number of users of RCT in Applicant's organization shows this was a personnel policy wrongly implemented and out of control. It is not evidence of a conspiracy or intent to defraud. In addition, the fact the organization's workforce had to be briefed at the conclusion of the investigation on the proper use of RCT indicates a policy wrongly interpreted and not a conspiracy.

Applicant was a very good technician and expertly fulfilled his technical function for the organization. The nature of the unfavorable information is a failure of management, leadership, and responsibility. He was in a high level position in the organization and should have questioned the use of RCT. Even though it was in place when he assumed the leadership position, there were bells, whistles, and red flags that should have alerted him, as a responsible leader, to question the practices. The HRD, the linchpin in the wrongful use of RCT, indirectly worked for Applicant. While Applicant asked him about the use of RCT, he did not insure, as a good leader and manager, that the practice was fully vetted within the staff and higher headquarters. In his own case, knowing very little, if any, annual leave was being taken, he should have been alerted that the procedures needed to be checked further. Applicant knew, or should have known, what the procedures were for requesting and approving leave for civilians. There is no information to suggest Applicant, and any other user of RCT at the organization, came together to plot to sue RCT to defraud the government. The large number of users of RCT in Applicant's organization instead points to a personnel policy wrongly implemented and out of control. In addition, the fact the organization's workforce had to be briefed at the conclusion of the investigation on the proper use of RCT indicates a policy wrongly interpreted, not a conspiracy. As the leader and manager of the organization, he did not assure the proper procedures were followed, not only for himself but for all in the organization.

Applicant cannot shirk his responsibility by placing the blame on the military commander. Applicant was the senior civilian in the organization, and the assigned military commanders came and went every few years. Applicant was the continuity factor. The military commander knew little of civilian personnel policy, and looked to the senior civilian for guidance in this area. While Applicant felt he only had technical responsibility, he did have a leadership and management responsibility that included insuring personnel policies were correct and followed. He did not fulfill his responsibilities in this area.

The actions of the senior military flag commander in removing Applicant from federal service and the SES were questioned as inappropriate, disproportionate and vindictive. There was sufficient information, evidence, and testimony in The Report for the flag officer commander to conclude Applicant had not fulfilled his responsibilities as a leader and manager. He was clearly within his own command responsibility to conclude that he had lost confidence in Applicant, and Applicant's actions required removal from federal service and SES.

The unfavorable information on Applicant and his pattern of rules violation in use of RCT must be weighted against his long stellar career in government service. Even if there is a determination that Applicant has not rebutted the allegation of dishonesty and rules violation for the restoration of leave, he has presented sufficient information to mitigate that issue also. The issue is whether this isolated black mark on Applicant's otherwise unblemished career is of such questionable judgment, untrustworthiness, unreliability, dishonesty, or unwillingness to comply with rules and regulations as to indicate Applicant is a security risk. The unfavorable information on Applicant is his failure to properly perform as the senior civilian leader and manager of his organization. He did not follow the rules concerning leave taking and accounting. He did not insure the proper rules were in place in the organization and followed. On the other hand, there is information, evidence, and testimony concerning Applicant's handling of classified information. He has held a security clearance and dealt with high level classified information, to include special compartmented information, for over 37 years. He had only two minor security violations early in his career. He has a reputation for security consciousness and adherence to strict security rules.

There was information, evidence, and testimony that Applicant's expertise is needed by the United States. There is no doubt Applicant has much to contribute to national security. However, the fact he is needed and can greatly contribute to national security has no bearing on a consideration of his security worthiness. Even though his talents are needed, if he is a security risk, he cannot be granted a security clearance.

As noted in the policy section of this decision, the security concern is that an unwillingness to comply with rules and regulations could indicate the Applicant may not properly safeguard classified information. Applicant presented information that he has and will properly safeguard classified information. In balancing his demonstrated security worthiness against unfavorable information and rule violations, I conclude Applicant has met his heavy burden to mitigate the security concerns for his personal conduct and is eligible for access to classified information.

I carefully considered all of the circumstances in light of the "whole person" concept. I have considered all of the favorable and unfavorable information concerning Applicant. As noted in the policy section above, I have considered the nature, extent, and seriousness of Applicant's conduct; the circumstances surrounding the conduct; the frequency of the occurrence; Applicant's age and maturity; his past history of handling classified information; and the possibility of the unfavorable actions recurring. I conclude Applicant is not a security risk and he is eligible for access to classified information.

FORMAL FINDINGS

Formal findings for or against Applicant on the allegation in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E: FOR APPLICANT

Subparagraph 1.a.: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national security to grant or continue a security clearance for Applicant. Clearance is granted.

Thomas M. Crean

Administrative Judge

1. This case is a companion case with ISCR Case No. 04-00471. The motion hearings in the two cases were heard together. The hearings on the merits were held separately, and the Decisions are rendered separately. The facts of the cases are similar since the government's case is based on the same report. There are minor differences of fact as noted in the Findings of Fact in each case.

2. Government Exhibit 1, (Inspector General's Report, dated Feb. 22, 2002 (The Report)). The Report examined three allegations (IG Allegations) of inappropriate action by Applicant. IG Allegation 1 concerned the accumulation of annual and sick leave. IG Allegation 2 concerned the use of Religious Compensatory Time. IG Allegation 3 concerned Applicant's actions in a personnel action transferring another employee. The details of the report will be fully discussed

in the Findings of Fact part of this decision.

3. Motion Exhibit 1 (Motion *In Limine*, dated Jun. 14, 2005).

4. Motion Exhibit 2 (Government's Answer Brief to Motion *In Limine*, dated Jun. 23, 2005).

5. Motion Exhibit 3 (Applicant's Rebuttal Brief to the Government's Answer Brief to the Motion *In Limine*, dated Jun. 27, 2005).

6. Motion Tr. 1, 14.

7. Motion Exhibit 3 (Applicant's Rebuttal Brief to Governments's Answer to the Motion *In Limine*, dated Jun. 27, 2005).

8. Motion Tr. 1, 22-23.

9. Motion Tr. 1, 7-8.

10. Motion Tr. 2, 6-9.

11. Motion Tr. 2, 10-11.

12. Tr. 145.

13. Tr. 112-113; Government Exhibit 3 (Security Clearance Application, dated Sep. 16, 2002).

14. Government Exhibit 4 (Final Decision on Proposed Removal, dated Jun. 21, 2002).

15. Government Exhibit 6 (Settlement Documents, dated Nov. 27, 2002).

16. Government Exhibit 5 (Notification of Personnel Action, dated Jun. 25, 2002).

17. The redacted report is admitted as Government Exhibit 1 and Government Exhibit 2 and will be referred to in this Decision as The Report. The entire report was included by Applicant as Exhibit 18 in his Apr. 8, 2004, Answer to the Statement of Reasons.

18. Government Exhibit 1 (The Report, paragraph 15).

19. For Applicant, it was 8 hours of annual leave, and 4 hours of sick leave.

20. Government Exhibit 1 (The Report, at paragraph 17, and Exhibit L).

21. For example, if the SES retires with 30 years of creditable service and has one year of accrued sick leave, the sick leave is added to the creditable service and the annuity is based on 31 years of service.

22. 5 U.S.C. 5550a.

23. 5 CFR § 550, subpart J; Govenment Exhibit 1 (The Report, at paragraph 193-194).

24. Government Exhibit 1 (The Report, at paragraphs 130-131).

25. *Id*., at paragraph 132.

26. OPM website www.opm.gov/oca/worksch/html/reli.htm; Government Exhibit 1 (The Report, at paragraph 197).

27. Court Exhibit 8 (SECNAVINST 7000.11C, at paragraph 5g); Government Exhibit 1 (The Report, at paragraph 195).

28. Government Exhibit 1 (The Report, at paragraph 196); Applicant Exhibit EEE (Letter, Religious Comp Time

Accumulation, dated May 26, 1992).

29. *See*, Government Exhibit 1 (The Report, at paragraphs 121 to 126).

30. 5 U.S.C. 6304 (d); 5 CFR § 630.305.

31. Government Exhibit 1 (The Report, at Exhibit T);

32. Government Exhibit 1 (The Report, at paragraph 14); Court Exhibit 6 (Organization Instruction 12610.1B, Variable Work Hours, dated Aug. 23, 1989).

33. Tr. 173-180; Government Exhibit 2 (The Report, at attachment BBBB).

34. Tr. 222. Applicant was a Department Director as an SES before assuming his final leadership position.

35. Government Exhibit 1 (The Report, at paragraph 43).

36. A summary in The Report of Applicant's leave from 1993 to 2001 shows he only took 40 hours of annual leave prior to the end of calendar year 1994. In 1993 and 1994, he took a total of 118.8 hours of RCT. During these two years, he would have earned 416 hours of annual leave. Even if RCT was improperly used, Applicant still did not take all of the annual leave he earned and therefore forfeited annual leave.

37. *See,* Government Exhibit 2 (The Report, at paragraph 168.a.; and attachment BBBB, Testimony of Applicant's secretary, dated Jul. 10, 2001).

38. Tr. 143-144.

39. Government Exhibit 1 (The Report, at paragraph 167).

40. It should be noted that not all of the leave hours noted in The Report and attributed to a certain category either track or add up. For purposes of this decision, the numbers do not have to track or be entirely accurate. They do show that there were a multitude of errors in the record keeping of Applicant's leave and the categorizing of the leave in The Report.

41. Applicant Exhibit NN (Attorney's letter, dated Jun. 18, 2002).

42. Government Exhibit 1 (The Report, at paragraph 134).

43. Tr. 129.

44. Tr. 151-153.

45. Tr. 164-170.

46. Tr. 170; Applicant Exhibit Z (Re-invention Laboratory Waiver, dated Oct. 22, 1996).

47. Government Exhibit 1 (The Report, at paragraphs 139-140).

48. *Id*., at paragraph 128.

49. *Id.,* at paragraph 141.

50. Tr. 184-189; Applicant Exhibits CC to FF, and FFF (Position papers, briefing slides, policy announcements).

51. Tr. 113-116.

52. Tr. 147-150; Tr. 158-163.

53. Government Exhibit 1 (The Report, at paragraph 135).

54. *Id*., at paragraph 203.

55. Tr. 178-180.

56. Government Exhibit 1 (The Report, at paragraph 11).

57. *Id*., at Exhibit V.

58. *Id.,* at paragraph 92.

59. *Id.,* at paragraphs 95-96.

60. *Id.,* at paragraph 97.

61. *Id.,* at paragraphs 99-100.

62. *Id.,* at paragraph 27.

63. *Id.,* at paragraph 28.

64. *Id.,* at paragraph 38.

65. *Id.,* at paragraph 39.

66. *Id.,* at paragraph 32.

67. Tr. 213-215.

68. Tr. 153-158.

69. Tr. 222-230.

70. Tr. 231-232.

71. Government Exhibit 1 (The Report, at paragraph 11).

72. Tr. 204-206.

73. Tr. 191-193; Applicant Exhibit HH (Status graph on use of RCT).

74. Tr. 153; Applicant Exhibits B through Y (Letters, plagues, and certificates of awards).

75. Tr. 49, 71, 87, 98, 145; *See*, Applicant Exhibits PP through BBB (Letters concerning Applicant).

76. Tr. 31-51.

77. Tr. 52-71.

78. Tr. 72-83.

79. Tr. 84-96.

80. Tr. 99-108.

81. *Department of the Navy v. Egan,* 484 U.S. 518 (1988).

82. Directive ¶ E2.2.1.

83. *Id.*

84. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

85. *See* Exec. Or. 10865 § 7.

86. Directive ¶ E3.1.14.

87. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15.

88. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

89. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993))

90. *Egan,* 484 U.S. at 531; *see* Directive ¶ E2.2.2.